

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTHONY PORTER,

No. C-08-1496 TEH (PR)

Petitioner,

v.

ORDER DISMISSING AS MOOT
PETITION FOR A WRIT OF HABEAS
CORPUS

ROBERT HOREL, Warden,

Respondent.

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Petitioner, a state prisoner incarcerated at Pelican Bay State Prison in Crescent City, California, has filed a pro se First Amended Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging a judgment of conviction from Monterey County Superior Court. The First Amended Petition was filed after the Court dismissed the initial Petition with leave to amend because it contained both exhausted and unexhausted claims. See Doc. #4. In the First Amended Petition, Petitioner removed the unexhausted claim and elected to proceed with the following two claims: (1) he was denied his Sixth Amendment right to the effective assistance of counsel based on trial counsel's failure to litigate the relevancy

1 and admissibility of evidence that Petitioner was involved in a
2 gang; and (2) newly discovered evidence shows that he is actually
3 innocent of the crimes of which he was convicted. Id. The Court
4 ordered Respondent to show cause why a writ of habeas corpus should
5 not be granted as to Petitioner's ineffective assistance of counsel
6 claim, but dismissed his actual innocence claim because "there is no
7 clearly-established Supreme Court authority recognizing that a free-
8 standing claim of actual innocence is cognizable on federal habeas
9 review [such that] relief cannot be granted on this claim. See 28
10 U.S.C. § 2254(d)." Doc. #6 at 3. Respondent has filed an Answer
11 and Petitioner has filed a Traverse. Doc. ##7, 9 & 10.

12 For the reasons that follow, the Petition for a Writ of
13 Habeas Corpus is DISMISSED as moot.

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15 I

16 Petitioner was convicted by jury in Monterey County
17 Superior Court of attempted murder, shooting at an inhabited
18 dwelling, assault with a semiautomatic firearm and shooting from a
19 motor vehicle. The jury also found true the following sentencing
20 enhancements: that the attempted murders were committed willfully,
21 deliberately and with premeditation; that all of the offenses were
22 committed for the benefit of a criminal street gang; and that
23 Petitioner personally used a firearm during the commission of the
24 attempted murders and assaults.

25 Following his convictions, Petitioner sought a new trial
26 under Penal Code section 1181(6), arguing there was insufficient
27 evidence to prove he acted with premeditation and deliberation, with
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1 intent to kill or for the benefit of a street gang. The trial court
2 granted a new trial on the gang enhancements and the allegation of
3 premeditation and deliberation. At sentencing, the court remarked
4 that the People could request a date for a new trial on the
5 premeditation allegation and gang enhancements, and, if a jury later
6 found them to be true, Petitioner could be resentenced, a proposal
7 to which Petitioner's counsel agreed. The court then imposed a
8 total term of imprisonment of twenty-five years. See Porter v.
9 Superior Court, 47 Cal. 4th 125, 130-31 (2009).

10 Petitioner then filed a demurrer and a motion to dismiss
11 in the trial court, claiming that a second trial on the sentencing
12 enhancements would violate double jeopardy. The trial court
13 rejected that argument, but the court of appeal disagreed,
14 concluding that retrial of the sentencing enhancements would violate
15 the double jeopardy clause. The court of appeal issued a peremptory
16 writ of mandate directing the trial court to dismiss the
17 enhancements. The California Supreme Court granted review to decide
18 whether double jeopardy principles permitted retrial of the
19 sentencing enhancements, and, in July 2009, reversed. See Porter,
20 47 Cal. 4th at 131-32. The California Supreme Court remanded the
21 case to the court of appeal for entry of an order lifting the stay
22 of proceedings and denying the petition for writ of mandate. Id. at
23 140.

24 While Petitioner was litigating the double jeopardy issue,
25 he also appealed the judgment of the trial court. The California
26 Court of Appeal affirmed the judgment in an unpublished opinion.
27 People v. Porter, No. H029031, 2006 WL 3649273 (Cal. Ct. App. Dec.

1 14, 2006). The court also denied habeas relief on the same day in a
2 separate order. In March 2007, the California Supreme Court denied
3 review.

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5 II

6 Article III, § 2 of the Constitution requires the
7 existence of a case or controversy through all stages of federal
8 judicial proceedings. This means that, throughout the litigation,
9 the plaintiff or petitioner "must have suffered, or be threatened
10 with, an actual injury traceable to the defendant and likely to be
11 redressed by a favorable judicial decision." Lewis v. Continental
12 Bank Corp., 494 U.S. 472, 477 (1990). An incarcerated prisoner's
13 challenge to the validity of his conviction satisfies the
14 case-or-controversy requirement, because the incarceration
15 constitutes a concrete injury, caused by the conviction, which is
16 redressable by the invalidation of the conviction. Spencer v.
17 Kemna, 523 U.S. 1, 7 (1998).

18 Here, Petitioner claims his trial counsel was ineffective
19 for failing to challenge on relevancy grounds evidence that was
20 admitted to prove the gang enhancements, which the jury found true.
21 Doc. #5. Respondent answers that Petitioner has failed to prove
22 that trial counsel was ineffective under both prongs of Strickland
23 v. Washington, 466 U.S. 668, 688 (1984). Doc. #7-1 at 9-11.

24 The Court cannot reach the merits of Petitioner's claim,
25 however, because the true findings on the gang enhancements were
26 vacated by the trial court when Petitioner was sentenced and were
27 not reinstated at the time Petitioner filed the instant Petition.

1 As a result, there is no case or controversy for this Court to hear.
2 Spencer, 523 U.S. at 7.

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4 The First Amended Petition for a Writ of Habeas Corpus is
5 DISMISSED as moot. The Clerk is directed to terminate any pending
6 motions as moot and close the file.

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8 IT IS SO ORDERED.

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10 DATED 10/27/09



THELTON E. HENDERSON
United States District Judge

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